UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW J UDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of Warren Sanford and The Estate of Carlos Guevara, Charging Party, v. The Elroy R. and Dorothy Burns Trust, et. al., Respondents. Respondents Respondents	CORRECTED COPY HUDALJ 09-92-1622-1 Dated: January 17, 1995

Roni Andresen, Esq.
For the Respondents

Elizabeth Frank, Esquire
David Godschalk, Esquire
Jon Seward, Esquire
M. Hope Young, Esquire
For the Charging Party

Before: William C. Cregar
Administrative Law Judge

INITIAL DECISION ON REMAND AND ORDER[1]

[1]The Initial Decision is reported as *HUD v. Burns Trust*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,073 (HUDALJ June 17, 1994).

Statement of the Case[2]

On June 17, 1994, I issued an Initial Decision and Order finding that Respondents, Elroy R. Burns, Dorothy Burns, and The Elroy R. and Dorothy Burns Trust[3] had discriminated against Complainants, Warren Sanford and Carlos Guevara,[4] in violation of the Fair Housing Act, as amended, 42 U.S.C. §§ 3601,*et seq.* ("the Act"). I found that the Department of Housing and Urban Development ("HUD" or "the Charging Party") had proved that Respondents evicted Complainants because of Mr. Guevara's handicap, in violation of 42 U.S.C. § 3604(f)(1). Specifically, I determined that Complainants were evicted because Mr. Guevara had Acquired Immune Deficiency Syndrome ("AIDS"). I awarded compensatory damages and assessed a civil penalty against Respondents.

Pursuant to 24 C.F.R. § 104.930,[5] on July 5, 1994, the Charging Party filed with

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[2]The following reference abbreviations are used in this decision: "Tr. 1," "Tr. 2," and "Tr. 3," followed by a page number for Transcript Volumes I, II, and III; "C.P. Ex." for the Charging Party's Exhibit; and "R.Ex." for Respondents' Exhibit.

[3]Respondents' resident manager, George Maynard, died soon before the filing of the charge. The Charging Party moved to amend the charge to reflect his death but was unable to locate and serve a personal representative of his estate. Accordingly, Mr. Maynard's estate is not a party to these proceedings. *Burns Trust,* 2 Fair Housing-Fair Lending at 25,672 n.1.

[4]Because Mr. Guevara died on March 23, 1993, the parties stipulated to substitute his estate as an aggrieved person. Tr. 1, pp. 8-11; *see also Burns Trust,* 2 Fair Housing-Fair Lending at 25,672 n.3.

[5]The regulation states that "[t]he Secretary may. . . remand the initial decision for further proceedings." 24 C.F.R. § 104.930(a).

the Secretary of Housing and Urban Development ("the Secretary"), a Motion to Remand the Initial Decision and Order so that it would have an opportunity to file a motion for reconsideration with this tribunal to address the civil penalty assessment. Respondents did not object to the Charging Party's Motion for Remand, provided that they also be provided the opportunity to petition for reconsideration. On July 18, 1994, the Secretary issued an order remanding the Initial Decision to "consider fully and fairly any motions for reconsideration" filed by the parties and any replies thereto. Secretary's Order Remanding Initial Decision (July 18, 1994). The Order further stated that the Remand would provide this tribunal the "opportunity to decide [any] motion fully and fairly before [the] Initial Decision [became] final pursuant to 42 U.S.C. § 3612(h)(1)." *Id.*

On August 3, 1994, I issued an Order requiring that (1) the Charging Party file its motion for reconsideration by August 17, 1994, (2) Respondents file their motion for reconsideration and/or response to the Charging Party's motion by August 26, 1994, and (3) the Charging Party file its response to Respondents' filing by September 2, 1994. On August 22, 1994, Respondents filed a Petition for Reconsideration asserting numerous bases for reconsideration. The Charging Party failed to file a motion by August 17th.[6] However, because of the voluminous nature of Respondents' Petition for Reconsideration, I granted the Charging Party an extension until September 9, 1994, in which to file any response. The Charging Party timely filed its Response. Finally, on October 3, 1994, Respondents submitted a Reply to the Charging Party's Response.[7]

Summary of Initial Decision

The Caprice Apartments ("the Caprice") is a 14-unit apartment complex located at 1725 Lacassie Avenue, Walnut Creek, California. The Caprice is owned by The Elroy and Dorothy Burns Trust which has as its beneficiaries Elroy R. and Dorothy Burns, a married couple. In January 1990, Mr. Burns hired George Maynard as the Caprice's

[6]On August 29th, the Charging Party moved for additional time to file a motion for reconsideration stating that the Charging Party's attorneys in the Washington, D.C. HUD office were unaware of the August 3rd Order and the schedule set forth therein. Respondents opposed the Charging Party's request because, *inter alia,* the Charging Party's lead counsel, located in HUD's San Francisco office, had been served with the August 3rd Order. Because the Charging Party failed to demonstrate good cause for granting additional time to file a motion for reconsideration, I denied the Charging Party's request.

[7]The Charging Party has not objected to my consideration of this additional filing. Accordingly, I have considered it. This submission requests, *inter alia*, that I not impose damages against Mr. and Mrs. Burns as they were not individually named as Respondents. This is not the case. On the first day of the hearing, I granted the Charging Party's unopposed Motion to Amend the Charge to include them as named parties. Tr. 1, p. 6.

resident manager and employed him in that capacity until his death from cancer in September 1993.

Warren Sanford and Carlos Guevara, a homosexual couple, resided in a one-bedroom apartment at the Caprice, from November 1989 until their eviction in June 1992. Messrs. Burns and Maynard knew that Complainants were homosexual. Complainants shared the monthly rent and utilities. They always paid their rent on time and they kept their apartment clean and well maintained.

Mr. Guevara was housebound because of illness for two to three weeks in March 1992. Around the beginning of April 1992, he was hospitalized with breathing problems and diagnosed with AIDS. On three separate occasions in April 1992, Mr. Maynard questioned Mr. Sanford concerning Mr. Guevara's whereabouts. Fearing that disclosure of the truth might subject them to eviction, Mr. Sanford replied on the first two of these occasions that Mr. Guevara was out of town. On or about April 22, 1992, Mr. Guevara was released from the hospital for a brief at-home visit during which he used a portable oxygen tank on wheels. During this visit Mr. Maynard observed Mr. Guevara whom he later described as looking "like death warmed over." On the morning of April 30, 1992, Mr. Maynard rummaged through Complainants' garbage and discovered a note which revealed that Mr. Guevara had been hospitalized with AIDS.

The next day Mr. Sanford went to Mr. Maynard's apartment to pay his rent. Mr. Burns was seated at Mr. Maynard's dining room table. After receiving Complainants' rent payment, Mr. Maynard handed Mr. Sanford a 30-day eviction notice. When Mr. Sanford asked why Complainants were being evicted, Mr. Maynard replied, "No particular reason. We're thinking of doing some remodeling. We'd like to add a bedroom to your unit." Mr. Burns nodded in agreement.[8] Contrary to Respondents' policy of providing two written warnings prior to eviction, Complainants had received no warning.

Mr. Sanford visited Mr. Guevara at the hospital on the evening of May 1st and informed him about the eviction. Immediately after receiving the eviction notice, Mr. Guevara's medical condition worsened. He required more oxygen, lost sleep, and became depressed. In addition, the eviction caused tension in Complainants' relationship because Mr. Guevara directed his anger at Mr. Sanford. Mr. Sanford was depressed for months after the eviction.

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[8]Respondents admit that the stated reason for the eviction was false. When HUD counsel questioned Mr. Burns as to why Mr. Maynard provided Mr. Sanford with a sham basis for the eviction, Mr. Burns responded, "I don't know. Maybe a face saving. . . instead of insulting him. . . ." Tr. 3, p. 801.

Mr. Guevara would have benefited from remaining at the Caprice. Because Mr. Sanford worked one block away from the Caprice, he would have been able to check on Mr. Guevara. Complainants' neighbors offered Mr. Sanford assistance in providing at-home care for Mr. Guevara. Joanne Burlison lived in the apartment directly above Complainants and worked across the street from the complex. She offered to bring Mr. Guevara lunch every weekday and to shop for groceries for Complainants. Because of the location and flexibility of her job and the proximity of her apartment, she stated that she "could be over there in a flash" if Mr. Guevara needed anything. Ms. Burlison's roommate, Eric Carroll, also offered assistance to Complainants. He was able to provide help because he worked at his home. He stated that because of their many friends at the Caprice, "[t]here was always going to be someone there." Finally, another neighbor, Autumn Faircain, informed Ms. Burlison that she, too, would be willing to assist Complainants.

Mr. Sanford was concerned that he would not be able to find a home conducive to Mr. Guevara's convalescence. He knew that the hospital would not discharge Mr. Guevara unless he found suitable living arrangements. Mr. Sanford began searching for alternate housing approximately two weeks after receiving the eviction notice. His search included the inspection of ten different apartments, nine of which they could not afford. Unable to locate an affordable one-bedroom apartment, around the first of June 1992, he settled on an affordable two-bedroom apartment at 1384 Oakland Boulevard in Walnut Creek.

On June 5, 1992, Mr. Maynard inspected Complainants' apartment. He informed Mr. Sanford that everything was satisfactory, and he reflected this conclusion on a "Check-In/Check Out List," indicating that Mr. Sanford would receive his entire security deposit. However, Mr. Maynard later falsified various entries on the list to justify withholding a portion of Mr. Sanford's security deposit.

Mr. Sanford moved into the Oakland Boulevard apartment on June 5th and still resided there on the date of the hearing. Even though the Oakland Boulevard apartment was not ready for occupancy when he moved in, because the 30-day notice period had elapsed, he had to vacate his home at the Caprice. The new apartment was unattractive, filthy, in disrepair, and in a poor location. Its amenities and location were much less desirable than those at the Caprice. At the time of the hearing, Mr. Sanford did not know any of his new neighbors, and he could not communicate with many of them because they did not speak English. An apartment in the complex housed five "skinheads," members of an Aryan white supremist group, who subjected Mr. Sanford to verbal abuse and

harassment because he is homosexual.[9]

In an attempt to make the new apartment habitable and attractive for Mr. Guevara's arrival, Mr. Sanford replaced the blinds and filthy carpeting. When Mr. Sanford had attempted to have management replace and/or pay for the carpeting and blinds, he was informed that the apartment had been rented "as is."

Mr. Sanford and Mr. Guevara's family were worried about the effect that the sanitation, dampness, and unattractive surroundings would have on Mr. Guevara's health. Mr. Guevara was abnormally affected by dampness because his disease constantly made him feel cold. Because of his weakened immune system, they were concerned that his condition might be aggravated by an upstairs toilet which leaked through the ceiling into the apartment's unfinished bathroom. Accordingly, after his discharge from the hospital on May 19, 1992, Mr. Guevara initially moved in with his sister in Hercules, California. Despite the concerns of Mr. Sanford and Mr. Guevara's family, Mr. Guevara left his sister's residence and joined Mr. Sanford in the Oakland Boulevard apartment around the end of June 1992.

Although rest was essential, Mr. Guevara found it difficult to sleep at the new apartment because of noise from the neighbors and construction work to repair the bathroom. Mr. Guevara was occasionally in a wheelchair, and he had to negotiate a few steps in the apartment. Although his sister and a social services "buddy" (a volunteer assigned to homebound AIDS patients) would visit occasionally, there were no neighbors to look in on him.

Mr. Guevara moved in with his parents at Vallejo, California in November 1992. Both Complainants considered this move necessary for his health, despite the fact that they did not want to be separated. While Mr. Guevara was at his parents' home, Mr. Sanford who did not own a car, found it difficult to visit Mr. Guevara. In addition, Mr. Sanford and Mr. Guevara's mother did not get along well. Mr. Sanford stated that

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[9]Mr. Sanford refers to himself as "out," meaning "out of the closet." Tr. 1, p. 47. He makes no attempt to conceal his sexual orientation.

"because of the distance factor and everything else considered, for all intents and purposes, it ended [our relationship]." Mr. Sanford lost sleep, began to drink heavily, and became less productive and more introverted at work.

Mr. Guevara died on March 21, 1993. Between the second and third week of April 1992, Mr. Sanford was diagnosed as having the Human Immunodeficiency Virus, or being "HIV positive."

I determined that the Charging Party proved a prima facie case of discrimination based on handicap, i.e., AIDS. *See Burns Trust,* 2 Fair Housing-Fair Lending at 25,678-79. Moreover, Respondents' articulated reasons for the eviction were pretextual, and the Charging Party established further evidence of Mr. Maynard's intent to discriminate. *Id.* at 25,679-81. Finally, although there was no direct proof that either of the Burnses had knowledge of Mr. Guevara's handicapping condition, I nevertheless, found them vicariously liable for the discriminatory eviction. *Id*. at 25,681-82.

I awarded the following damages: $3,055.75 for out-of-pocket expenses to Mr. Sanford; $30,000 for inconvenience, lost housing opportunity, and emotional distress to Mr. Sanford; and $50,000 for inconvenience, lost housing opportunity, and emotional distress to the Estate of Carlos Guevara. In addition, I assessed a civil penalty of $1,500 against Respondents jointly and severally and granted injunctive relief. *Id*. at 25,682-85.

Remand and Reconsideration

The Secretary's Order remanding the Initial Decision invests this tribunal with jurisdiction to decide Respondents' motion and the Charging Party's response. *See* 5 C.J.S. *Appeal and Error* § 968 (1993). Moreover, "[administrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider." *Trujillo v. General Electric Co.*, 621 F.2d 1084, 1086 (10th Cir.1980) (citing *Albertson v. F.C.C.,* 182 F.2d 397, 399 (D.C. Cir. 1950)). Because the Secretary's Order did not delineate standards or specify particular issues for reconsideration, I apply the standards used by courts in deciding motions for reconsideration.[10]

[10] Although the Federal Rules of Civil Procedure do not directly authorize motions for reconsideration, they are recognized as creatures of case law and have been judged by various courts under the standards set forth in either Federal Rule of Civil Procedure 59(e) (motions to alter or amend a judgment) or 60(b) (relief from judgment or order - mistakes, inadvertence, excusable neglect, newly discovered evidence, fraud, etc.). *See Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d 350, 353 (5th Cir. 1993); *Woodard v.*

Hardenfelder, 845 F. Supp. 960, 966 (E.D. N.Y. 1994); *Nobell, Inc. v. Sharper Image Corp.*, 24 U.S.P.Q.2d (BNA) 1919; 1992 WL 421456 (N.D. Cal. Apr. 17, 1992); *Quaker Alloy Casting Co. v. Gulfco Industries, Inc.*, 123 F.R.D. 282, 288 n.9 (N.D. Ill. 1988); *Nat'l Union Fire Insurance Co. of Pittsburgh v. Continental Illinois Corp.*, 116 F.R.D. 252, 253 (N.D. Ill. 1987).

The Federal Rules of Civil Procedure may provide guidance in these proceedings. *See e.g., HUD v. Wagner*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,032, 25,336 n.8 (HUDALJ June 22, 1992); *HUD v. Downs*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,017, 25,235 (HUDALJ November 22, 1991); *HUD v. Jerrard*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,005, 25,086 (HUDALJ Sept. 28, 1990).

Motions for reconsideration have a "limited appropriateness," because "opinions are not intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure." *Quaker Alloy Casting Co. v. Gulfco Industries, Inc.*, 123 F.R.D. 282, 288 (N.D. Ill. 1988); *see Woodard v. Hardenfelder*, 845 F. Supp. 960, 966 (E.D. N.Y. 1994). Generally, they are granted only "to correct manifest errors of law or fact or [to allow a party] to present newly discovered evidence."[11] *Nobell, Inc. v. Sharper Image Corp.*, 24 U.S.P.Q.2d (BNA) 1919; 1992 WL 421456 (N.D. Cal. Apr. 17, 1992) (quoting *Harsco Corp. v. Zlotnick*, 779 F.2d 906, 909 (3d Cir. 1985), *cert. denied*, 476 U.S. 1171 (1986)). Standards of "clear error" or "manifest injustice" preclude reconsideration of arguments made previously or arguments that a party merely failed to raise earlier. *See Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985); *Fay Corp. v. Bat Holdings I, Inc.*, 651 F. Supp. 307, 309 (W.D. Wash. 1987), *aff'd*, 896 F.2d 1227 (9th Cir. 1990). In fact, arguments that a party failed to raise earlier are deemed waived, absent "extraordinary circumstances." *McConnell v. MEBA Medical & Benefits Plan*, 759 F.2d 1401, 1407 (9th Cir. 1985). Thus, motions for reconsideration are granted when a party has been patently misunderstood, a tribunal has committed an error of apprehension, not reasoning, or there has been a significant change in the law or facts. *See Quaker Alloy Casting*, 123 F.R.D. at 286 (quoting *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc*, 99 F.R.D. 99, 101 (E.D. Va. 1983)).

Discussion

1. Arguments Respondents Raised Earlier/Arguments Respondents Failed to Raise

Although Respondents have asserted numerous bases for reconsideration, several of these were either raised earlier or could have been raised at the hearing but were not. For the reasons that follow, I decline to consider them at this time.

For the first time, Respondents assert that the Charging Party failed to comply with statutory requirements to notify them of the Complaint within ten days after its filing and to engage in conciliation. *See* 42 U.S.C. §§ 3610(a)(1)(B)(ii) and (b). These arguments are deemed waived because Respondents could have raised them earlier but failed to do

[11] "Newly discovered evidence" (1) is of such a nature that it would change the outcome of the prior decision, (2) must have been undiscovered at the time of the prior decision, and (3) could not have been discovered through the exercise of reasonable diligence. Accordingly, if "evidence was previously available, the motion fails as a matter of law." *Nobell*, U.S.P.Q.2d at 1919 (citing *Trentacosta v. Frontier Pacific Aircraft Industries*, 813 F.2d 1553, 1557 n.4 (9th Cir. 1987)); *Shiley, Inc. v. Bentley Laboratories, Inc.*, 115 F.R.D. 169, 170 (C.D. Cal. 1987); *Fernhoff v. Tahoe Regional Planning Agency*, 622 F. Supp. 121, 122 (D. Nev. 1985)); *see generally* James W. Moore, et al., 7 *Moore's Federal Practice* ¶ 60.23[4] (2d ed. 1987); *see also* 24 C.F.R. § 104.810.

so.[12]

Respondents reassert their prior argument that the Charging Party's noncompliance with the 100-day requirement mandates dismissal of this case. The Act provides that within 100 days after the filing of a complaint, HUD shall complete its investigation and make a reasonable cause determination "unless it is impracticable to do so." 42 U.S.C.

[12]Moreover, Respondents have not claimed they were prejudiced by the purported failure to notify them within the ten-day period.

§§ 3610 (a)(1)(A)(i), 3610 (a)(1)(B)(iv), and 3610 (g). If HUD is unable to meet the 100-day limit, it must notify the parties in writing of the reasons.[13] 42 U.S.C. §§ 3610 (a)(1)(C), 3610 (g)(1). In the Initial Decision, I concluded that Respondents had neither alleged nor demonstrated that they suffered prejudice as a result of noncompliance with the 100-day requirement and, accordingly, that they had failed to demonstrate that this case should be dismissed. *See Burns Trust,* 2 Fair Housing-Fair Lending at 25,677-78; *see also United States v. Beethoven Assocs. Ltd. Partnership*, 843 F. Supp. 1257, 1264 (N.D. Ill. 1994); *United States v. Forest Dale, Inc.*, 818 F. Supp. 954, 966 (N.D. Tex. 1993); *United States v. Curlee,* 792 F. Supp. 699 (C.D. Cal. 1992). Respondents now claim that during the hearing they were prejudiced by an inability to call Mr. Maynard as a witness because HUD's delay resulted in this hearing taking place after his death. The record does not support this assertion of prejudice.[14] Accordingly, there is no basis for

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[13]The Charging Party now proffers exhibits which, if accepted, would demonstrate that HUD actually notified Respondents of the reasons for the delay. Because this information was readily available at the hearing and the Charging Party should have known that it was relevant to Respondents' argument, this proffer does not qualify as newly discovered evidence and, accordingly, is rejected. *See* 24 C.F.R. § 104.810.

[14]Respondents identify two occasions, well into the second day of the hearing, when Mr. Maynard's unavailability as a witness was mentioned. Both instances concerned the Charging Party's attempt to introduce evidence of reprisal against other tenants who protested Complainants' eviction, evidence which I excluded. Tr. 2, pp. 425-26, 571-72. At no time during the hearing did Respondents articulate a connection between Mr. Maynard's death prior to the hearing and HUD's failure to process the case within 100 days, nor did they contend that Mr. Maynard's death precluded them from defending this action. I have again reviewed Respondents' Answer, pre-hearing brief, opening statement, and post-hearing brief, and reach the same conclusion. Respondents never contended in these pleadings and filings that Mr. Maynard's death precluded

reconsidering my determination that this case should not be dismissed for failure to comply with these provisions of the Act.

The issue of the Burns' vicarious liability for the acts of Mr. Maynard was litigated at the hearing and discussed in the Initial Decision. *See* Respondents' Trial Brief (Feb. 1, 1994) at 4-5 ("Respondents' pre-hearing brief"); Respondents' Closing Brief and Final Arguments (Apr. 14, 1994) at 2, 20-23 ("Respondents' post-hearing brief");*Burns Trust,* 2 Fair Housing-Fair Lending at 25,681-82. Because, this issue was raised earlier and addressed in the Initial Decision, I decline to reconsider these arguments.

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them from defending this case, nor did they connect HUD's failure to process this case within 100 days with any inability to defend this action because of his death.

Respondents assert for the first time that a decedent's estate is not entitled to damages for emotional distress and that the Charging Party did not comply with Rule 25 of the Federal Rules of Civil Procedure in substituting the decedent's estate as a party to this action for the decedent.[15] Mr. Guevara died in March of 1993. The October 1993 Charge of Discrimination seeks, *inter alia*, emotional distress damages. Moreover, at the February 1994 hearing, Respondents were on notice that Mr. Guevara's sister was awaiting appointment as the Special Administrator for his estate for the purpose of representing the deceased. Thus, Respondents were on notice that the Charging Party was seeking emotional distress damages for Mr. Guevara's estate. In addition, the parties stipulated at the hearing that Mr. Guevara's estate had been substituted for the decedent as a complainant in this action. Tr. 1, pp. 8-9. Finally, in his opening statement, Respondents' counsel stated, "We have essentially an [e]state of Mr. Guevara. There's no question that allocation can be made for damages in that sense. . . ." Tr. 1, p. 38. Accordingly, Respondents waived these assertions.

Respondents contend that I cannot award damages to Mr. Sanford for the emotional distress he experienced as a witness to Mr. Guevara's suffering. At the hearing I asked for the views of the parties on the appropriateness of awarding emotional distress damages to an aggrieved person resulting from damage suffered by another aggrieved person. Tr. 1. pp. 38-39, 842. Respondents did not address this issue in their post-hearing brief. Accordingly, Respondents waived their opportunity to address it now.[16]

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[15]Unlike the Secretary and Respondents, Mr. Guevara's estate is not strictly speaking, "a party." Rather, it is an "aggrieved person." (*See* 24 C.F.R. § 100.20 which defines person to include "legal representatives.") Accordingly, Rule 25, which refers to the substitution of "parties," is inapposite.

[16]Respondents characterize the award of emotional distress damages to Mr. Sanford as damages for "loss of consortium" and assert that I cannot authorize such an award to a homosexual couple because this relationship is not recognized as a marriage under California law. The Initial Decision does not award damages for loss of consortium. Rather, it awards each individual Complainant damages for emotional distress, including distress that resulted from the negative impact of the discriminatory act(s) on their relationship. The Act states that upon a finding of discrimination, the administrative law judge shall award "actual damages suffered by the aggrieved person." 42 U.S.C. § 3612(g)(3). These include compensation for strained relationships, and the victim's concern for other aggrieved persons. *See, e.g., Woods-Drake v. Lundy*, 667 F.2d 1198, 1203 (5th Cir. 1982); *HUD v. Blackwell*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,001, 25,013 (HUDALJ Dec. 21, 1989), *aff'd*, 908 F.2d 864 (11th Cir. 1990). The award for emotional distress damages is not dependent upon the aggrieved parties' involvement in a legally recognized relationship such as a marriage. *See, e.g., Littlefield v. McGuffey*, 954 F.2d 1337, 1341 (7th Cir. 1992) (Emotional distress damages were awarded for housing discrimination because of white female plaintiff's relationship with her black boyfriend.); *Woods-Drake*, 667 F.2d at 1203 (Emotional distress damages are appropriate for strained relationships in the workplace resulting from housing discrimination.); *HUD v. Tucker* 2 Fair Housing-Fair Lending (P-H) ¶ 25,033, at 25,350 (HUDALJ Aug. 24, 1992) (An unmarried couple whose relationship became strained after they moved because of racial discrimination was awarded damages for emotional distress.), *submission of appeal vacated*, No. 92-70697 (9th Cir. July 18, 1994) (unpublished

order); *HUD v. Gutleben*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,078 (HUDALJ Aug. 15, 1994) (A grandmother was awarded damages for the emotional distress she suffered from her inability to shield her grandchildren from racial discrimination, despite the fact that there was no evidence of legal guardianship.).

Finally, Respondents again contend that a civil penalty[17] should not be imposed where there has been no showing that Mr. Burns personally intended to discriminate against Mr. Guevara. The Initial Decision found that Mr. Burns blindly followed the recommendation of his manager, and articulated false reasons for so doing. Having considered and disposed of the contention in the Initial Decision, I decline now to reconsider it.

2. New Matters

Respondents have taken issue with a number of determinations in the Initial Decision relating to the appropriateness and amount of the damage award and civil penalty. Because these contentions flow from the Initial Decision and, therefore, could not have been raised at the hearing, they are appropriate matters for reconsideration. Accordingly, I grant Respondents' Motion for Reconsideration regarding the legality and appropriateness of the damage award and civil penalty. Having reconsidered the Initial Decision in light of Respondents' contentions, I conclude, with two exceptions discussed below, that the damage awards and civil penalty are consistent with existing case law and are supported by the record.

I have revisited my determinations on three issues raised by Respondents and I have modified the decision in two respects. First, I have reassessed Complainants' damage award to reflect that their friends, Joanne Burlison and Eric Carroll, moved out of the Caprice approximately two months after Complainants' eviction. Second, I have revisited my determination to impose a civil penalty jointly and severally against Respondents, and have concluded that under the circumstances of this case, such a penalty is authorized and appropriate. Third, I have reassessed the civil penalty to correct an erroneous determination on my part to consider the Charging Party's failure to notify Respondents that the investigation would exceed 100 days in determining the amount of the civil penalty. Finally, I have revisited my determination to impose a civil penalty jointly and severally against Respondents, and have concluded that under the circumstances of this case, such a penalty is authorized and appropriate.

In contesting the amount of emotional distress damages awarded, Respondents assert that it should be decreased because two of Complainants' friends, Joanne Burlison and Eric Carroll, moved out of the Caprice shortly after Complainants' eviction. The Initial Decision found that Complainants' friends at the Caprice, including Ms. Burlison and Mr. Carroll, offered Mr. Sanford assistance in providing at-home care for

[17] In making this argument, Respondents erroneously referred to "punitive damages" rather than a civil penalty. Respondents' pre-hearing brief, at 9-10.

Mr. Guevara. Ms. Burlison's and Mr. Carroll's apartment was located directly above Complainants'. In addition, Ms. Burlison worked across the street from the Caprice and Mr. Carroll worked out of their apartment at the Caprice. Given the location of their residence and places of employment, the two friends could readily assist Complainants. *See Burns Trust,* 2 Fair Housing-Fair Lending at 25,675.

Ms. Burlison and Mr. Carroll moved out of the Caprice in or before August of 1992, one to two months after Complainants left the Caprice. *See* Respondents' Motion for Reconsideration; Tr. 3, pp. 613 and 654. Thus, the locations of Ms. Burlison's and Mr. Carroll's residence and Mr. Carroll's place of employment were no longer as conducive to assisting Complainants as they once had been. However, because the record does not reflect that Ms. Burlison's place of employment changed, Complainants would still have received some assistance from her. In recognition of the fact that Ms. Burlison and Mr. Carroll moved out of the Caprice by August of 1992, I have reduced the emotional distress damages awarded to the Estate of Mr. Guevara by $1000 and the emotional distress damages awarded to Warren Sanford by $500.

Both parties contend the civil penalty should not be imposed against Respondents jointly and severally and both contest the $1500 amount. Respondents argue that the civil penalty is excessive. The Charging Party argues that it is insufficient. As explained above, *see supra* note 6, the Charging Party did not timely file a Petition for Reconsideration, and accordingly, I decline to entertain the argument affirmatively set forth in its Opposition to the Respondents' Petition, that I should increase the amount of the civil penalty.

The civil penalty is appropriately assessed jointly and severally against Respondents. First, neither the Act nor the legislative history precludes a civil penalty from being imposed jointly and severally under appropriate circumstances. Second, public policy warrants precluding respondents from evading payment by shifting assets to co-respondents.

Respondents assert that a civil penalty is the equivalent of an award for punitive damages and that punitive damages are against individuals. However, civil penalties and punitive damages are not equivalent. Under the Act, civil penalties may be assessed only by this administrative tribunal while the courts may assess "punitive damages" as a part of court ordered relief. *Compare* 42 U.S.C. § 3612(g)(3) *with* 42 U.S.C. §§ 3612(o) and 3613(c). In addition, civil penalties differ from punitive damages because civil penalties are imposed solely "to vindicate the public interest," and are subject to statutorily imposed maximum limits. *See* 42 U.S.C. § 3612(g)(A)-(C).

The Charging Party relies upon language in the legislative history and the Act that

refers to "a respondent" and "the respondent."[18] *See* C.P.'s Response at 22-23. The use of singular, rather than plural references to respondent(s) does not address this issue. The entire paragraph refers to a single respondent. Accordingly, the Charging Party's reading would also appear to prohibit joint and several damage awards. Such a result would be inconsistent with other decisions of this tribunal and of the United States District Courts. *See, e.g., Chicago v. Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d 1086 (7th Cir. 1992) *cert. denied sub nom*., *Erndt v. Leadership Council For Metro Open Communities* 113 S. Ct. 2961 (1993); *Seaton v. Sky Realty Co., Inc.*, 491 F.2d 634, 637-38 (7th Cir. 1974); *Saunders v. General Servs. Corp.*, 659 F. Supp. 1042, 1064 (E.D. Va. 1987); *HUD v. Ross*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,075, 25,704 (HUDALJ July 7, 1994); *HUD v. Tucker*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,033, 25,353 (HUDALJ Aug. 24, 1992), *submission of appeal vaccated*, No. 92-70697 (9th Cir. July 18, 1994) (unpublished order).

The prohibition against joint and several awards would also arguably conflict with the phrase, "such relief as may be appropriate." There are situations such as the instant case, where the imposition of a joint and several civil penalty is appropriate. Here we have a husband and wife and a trust. The husband and wife are beneficial owners of the

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[18] The Act provides:

> If the administrative law judge finds that *a respondent* has been engaged or is about to engage in a discriminatory housing practice, such administrative law judge shall promptly issue an order for such relief as may be appropriate, which may include actual damages suffered by the aggrieved person and injunctive or other equitable relief. Such order may, to vindicate the public interest, assess a civil penalty against *the respondent*. . .

42 U.S.C. § 3612(g)(3) (emphases added). The discussion in the legislative history which delineates the factors to be considered in assessing a penalty also refers to "respondent" in the singular. *See* H. Rep. No. 711 at 37. The applicable HUD regulation merely repeats the language of the statute. *See* 24 C.F.R. § 104.910(b)(3).

trust. Under these circumstances, it might be possible for assets to be shifted to a co-respondent thereby making collection more difficult, if not preventing it completely.

I have *sua sponte*[19] reconsidered the appropriateness of decreasing the civil penalty because of HUD's failure to notify the parties of its reasons for its failing to meet the 100-day time limit. I conclude that a failure to so notify the parties should not be a consideration in ascertaining the amount of a civil penalty. My reliance upon *HUD v. Baumgardner*, 960 F.2d 572 (6th Cir. 1992), to impose a *per se* rule requiring the reduction of a civil penalty was misplaced. The *Baumgardner* court reduced the civil penalty based in part, upon a finding that HUD's mismanagement of the complaint adversely affected the conciliation process. The instant record does not reflect a similar failing. Accordingly, I have reassessed the civil penalty so as not to take account of HUD's failure to notify the parties of the reasons for failing to meet the 100-day time limit. Because I erred in considering the failure to notify the parties of the reasons for failing to meet the 100-day time limit, I am increasing the civil penalty to $1,600. Accordingly, I find that a penalty of $1,600 is reasonable under the circumstances and that this penalty is to be assessed jointly and severally against Respondents.

Conclusion and Order

Accordingly, it is **ORDERED** that Respondents' Motion for Reconsideration is *granted in part* to the extent that the award for damages to the Estate of Carlos Guevara is decreased by $1,000 to $49,000, and the award to Warren Sanford is decreased by $500 to $29,500. The civil penalty is also reassessed and is hereby increased by $100 to $1,600. Accordingly, Paragraphs 5 and 6 of the Initial Order are modified to read as follows:

5. Within forty-five (45) days of the date on which this Order becomes final, Respondents shall pay the following damages: $3,055.75 for out-of-pocketexpenses to Complainant Warren Sanford; $29,500.00 for inconvenience, lost housing opportunity, and emotional distress to Complainant Sanford; and $49,000 for inconvenience, lost housing opportunity, and emotional distress to the Estate of Carlos Guevara.

6. Within forty-five (45) days of the date on which this Order becomes final,

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[19]The Charging Party's argument that the imposition of a civil penalty should not take into consideration HUD's failure to notify Respondents that the investigation would exceed 100 days is set forth in its opposition to Respondents' Petition for Reconsideration. As noted above, the Charging Party has no Motion for Reconsideration before me. However, I conclude that, under the circumstances of this case, my determination on this point warrants correction.

Respondents shall pay a civil penalty of $1,600 to the Secretary of HUD.

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WILLIAM C. CREGAR
Administrative Law Judges

Dated: January 17, 1995.